

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

GERALD SIDNEY RACE, III,

Defendant-Appellant.

UNPUBLISHED

August 13, 2013

No. 310210

Mecosta Circuit Court

LC Nos. 09-006574-FC;

09-006659-FH

Before: WHITBECK, P.J., and OWENS and M. J. KELLY, JJ.

PER CURIAM.

Defendant, Gerald Sidney Race, III, appeals as on leave granted¹ the trial court's order revoking his probation and sentencing him to serve 71 months' to 15 years' imprisonment. Because insufficient evidence supported one of the counts that Race violated his probation, we vacate Race's sentence and remand for resentencing.

I. FACTS

In October 2009, Race pleaded nolo contendere to two counts of second-degree criminal sexual conduct (CSC II)² and one count of gross indecency between males.³ The complainants were three minor siblings. The trial court sentenced him to serve one year of imprisonment and five years of probation. Conditions of Race's probation included that he (1) could not have any verbal, written, electronic, or physical contact with any child, (2) could not be romantically involved with anyone who had custody of minor children, (3) could not be within 500 feet of parks, playgrounds, schools, or similar locations where children gather, and (4) could not have any contact with the three minor complainants or be within 500 feet of places where they might be present.

¹ *People v Race*, 493 Mich 890 (2012).

² MCL 750.520c(1)(a).

³ MCL 750.338.

Race testified that on March 29, 2011, he was at Jerry Keller's house when he saw that a school bus was approaching. Keller testified that he lived with a woman who had children, and that Race knew that he was not supposed to be around them. According to Keller, Race would call before coming over to Keller's home to make sure that the woman's children were not present. When Race saw the bus approaching, Race told Keller that he had to leave because the bus was coming and entered his truck, but the bus blocked Race's truck into Keller's driveway.

Darlene Bongard, the children's bus driver, testified that she usually drops a 13-year-old and 11-year-old off at Keller's resident at about 3:50 P.M. and drops the oldest complainant off afterward. Bongard testified that she saw someone in a truck trying to leave the driveway as she dropped off the 13- and 11-year-old. The oldest complainant testified that she and her sister, the second complainant, saw Race and his truck, and that he was at the home of a 13-year-old girl and 11-year-old boy who rode her bus.

The oldest complainant testified that Race did not look like he was trying to leave, but was instead standing and speaking with Keller. She testified that Race was very close to the bus. She testified that he had waved at the bus on separate occasions while she was on it, but did not look at or wave at her on March 29, 2011. Keller and the woman with whom the children lived both testified that the woman's 9-year-old boy was not at the residence while Race was there, but was instead staying with a relative.

The petition to revoke Race's probation alleged that Race violated the terms of his probation on March 29, 2011, in part by (1) having contact with a 13-year-old girl; (2) having contact with an 11-year-old boy; (3) having contact with a 9-year-old boy; and (4) being within 500 feet of the second complainant when he was at the bus stop where she was located.

The trial court found that Race was frequenting a home where minor children lived. It found that Race had contact with the oldest complainant by waving at her, and that he was on the property of two children when they got off the bus. It also found that a school bus is the functional equivalent of a school, and that, by being within 500 feet of the school bus, Race was within 500 feet of a school. The trial court revoked Race's probation, and sentenced him to serve 71 months' to 15 years' imprisonment.

II. PROBATION REVOCATION

A. STANDARD OF REVIEW

In Michigan, probation revocation is a two-step process: the trial court makes a factual determination concerning whether a defendant violated probation, then determines whether the violation warrants revoking probation.⁴

This Court generally reviews de novo claims concerning the sufficiency of the evidence in a criminal proceeding.⁵ A trial court's decision to revoke a defendant's probation must be

⁴ MCR 6.455(E) and (G); *People v Pillar*, 233 Mich App 267, 269; 590 NW2d 622 (1998).

based on facts in the record.⁶ We review the evidence in a light most favorable to the prosecution to determine whether a rational trier of fact could find that the prosecution proved that the defendant violated his or her probation by a preponderance of the evidence.⁷ This Court reviews for an abuse of discretion the trial court's discretionary decision to revoke probation.⁸ The trial court abuses its discretion when its decision results in an outcome outside the principled range of outcomes.⁹

If a defendant failed to preserve a challenge at his or her parole revocation hearing, we will review the unpreserved challenge for plain error affecting the defendant's substantial rights.¹⁰ An error is plain if it is clear or obvious.¹¹ An error affected the defendant's substantial rights if the error affected the outcome of the lower court proceedings.¹²

B. LEGAL STANDARDS

In Michigan, probation is a matter of grace—not a matter of right—and a defendant has no vested right in its continuance.¹³ However, a probationer is entitled to a measure of due process before a court revokes his or her probation.¹⁴ Among other protections, the probationer has the right to notice of the claimed violation, a statement of the facts that the trier of fact relied on, and its reasons for revoking probation.¹⁵

C. SUFFICIENCY OF THE EVIDENCE

Race contends that the trial court erroneously found that the prosecution proved all four of the counts against him. We conclude that the trial court erroneously determined that the evidence supported one of the counts against Race.

First, Race contends that there was no evidence that he had contact with the 9-year-old boy because all the witnesses testified that the boy was not at Keller's residence at the time that Race was there. We agree. Here, both witnesses who knew where the 9-year-old boy was

⁵ *People v Kanaan*, 278 Mich App 594, 618; 751 NW2d 57 (2008).

⁶ *People v Breeding*, 284 Mich App 471, 487; 772 NW2d 810 (2009).

⁷ *Id.*

⁸ *People v Ritter*, 186 Mich App 701, 706; 464 NW2d 919 (1991).

⁹ *Breeding*, 284 Mich App at 479.

¹⁰ *Breeding*, 284 Mich App at 487; *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

¹¹ *Carines*, 460 Mich at 763.

¹² *Id.*

¹³ MCL 771.4; *People v Harper*, 479 Mich 599, 626; 739 NW2d 523 (2007).

¹⁴ *Gagnon v Scarpelli*, 411 US 778, 782; 93 S Ct 1756; 36 L Ed 2d 656 (1973).

¹⁵ See *Morrissey v Brewer*, 408 US 471, 489; 92 S Ct 2593; 33 L Ed 2d 484 (1972).

located testified that he was not home when Race was there, and no witnesses testified that he was at the home. We conclude that the facts in the record were not sufficient to support the trial court's finding that Race had contact with the 9-year-old boy.

Race also contends that there was no evidence that he had contact with the 13-year-old girl or the 11-year-old boy and that the word "contact" is unconstitutionally vague. We disagree. Race did not preserve his constitutional challenge by raising it at the probation revocation hearing, so we will review this challenge for plain error affecting his substantial rights.

The trial court may impose conditions on a defendant's probation, to the extent that the particular case's circumstances warrant them.¹⁶ This Court may consider a defendant's claim that a condition of probation is impermissibly vague only to the extent that it relates to whether the trial court properly revoked probation.¹⁷ Because due process entitles a probationer to notice of the conditions of his probation, this Court considers constitutional vagueness challenges to probation conditions in the same way that it considers vagueness challenges to penal statutes.¹⁸

"A penal statute is unconstitutionally vague if (1) it does not provide fair notice of the conduct proscribed, (2) it confers on the trier of fact unstructured and unlimited discretion to determine whether an offense has been committed, or (3) its coverage is overbroad and impinges on First Amendment freedoms."¹⁹ If the defendant's vagueness challenge does not concern First Amendment freedoms, this Court must evaluate the vagueness of the statute "in light of the particular facts at hand[.]"²⁰ Race's challenge does not concern First Amendment freedoms; he contends that his probation conditions deprived him of fair notice of the conduct that they proscribed because the word "contact" is ambiguous.

We conclude that Race was aware of the conduct that the conditions of his probation proscribed. The definition of "conduct" includes not only touching, meeting, or communicating, but also being in "immediate proximity or association."²¹ Here, it is clear from the record that Race understood that being in the children's proximity constituted contact. Before going to Keller's house, Race would call to make certain that the children were not there. Keller testified that Race knew that he was not supposed to be there when the children were there. Finally, Race told Keller that he had to leave because the bus was coming. We conclude that Race was aware that he was not supposed to be in proximity with the 13- or 11-year old.

¹⁶ MCL 771.3(3).

¹⁷ *People v McNeil*, 104 Mich App 24, 26; 303 NW2d 920 (1981); see *People v Pickett*, 391 Mich 305, 316-317; 215 NW2d 695 (1974).

¹⁸ See *People v Bruce*, 102 Mich App 573, 577-578; 302 NW2d 238 (1980).

¹⁹ *People v Newton*, 257 Mich App 61, 66; 665 NW2d 504 (2003).

²⁰ *Id.*, quoting *People v Vronko*, 228 Mich App 649, 652; 579 NW2d 138 (1998).

²¹ *Random House Webster's College Dictionary* (1997).

The evidence supported the trial court's finding that Race had contact with the 13- and 11-year-old children. Keller testified that the bus blocked Race's truck in the driveway. The oldest complainant testified that Race was "very close" to the bus. Race may not have touched or communicated with the children, but the testimony at trial was sufficient to support a finding that Race was in close proximity to them when they exited the bus.

Finally, Race contends that there was no evidence that he had contact with the second complainant, the sister of the complainant who testified. Here, the oldest complainant testified that Race was "very close" to the bus and that her sister, the named complainant, was also on the bus. We conclude that the trial court's finding that the prosecution had proved that Race was within 500 feet of the second complainant was not erroneous.

D. UNCHARGED CONDUCT

Race contends that the trial court improperly relied on uncharged conduct to support its decision to revoke his probation. We agree.

Defense counsel argued that the trial court could not consider evidence that did not relate to the counts before it, including the oldest complainant's testimony that Race waved to her on another occasion. The trial court indicated that it would not consider the evidence extraneous to the incidents charged in the petition to revoke Race's probation when making its decision.

However, the trial court's subsequent findings of fact mentioned some of the exact instances of uncharged conduct that defense counsel argued that it should not consider. The trial court's findings included that (1) Race was frequenting a home where children were likely to be; (2) the oldest complainant saw Race near the bus on three occasions, and waved to her on one occasion, apparently in violation of the condition of his probation prohibiting him from having contact with the oldest complainant; and (3) Race was near the school bus, which was the functional equivalent of being within 500 feet of a school, in violation of the condition of his probation prohibiting him from frequenting "parks, municipal swimming pools, playgrounds, child care centers, pre-schools, arcades, or other places primarily used by individuals age 17 or under"

The petition did not charge that Race frequented the home of minor children, or that any of Race's conditions of probation prohibited him from visiting an adult friend in a home in which children lived when the children were not present. The petition did not charge that he violated his probation by having contact with the oldest complainant or by being within 500 feet of a school. And the petition did not charge that Race violated his probation by being within 500 feet of a school. We conclude that the trial court impermissibly relied on conduct that was not charged in the petition when it revoked Race's probation.

In *People v Pillar*, when the trial court relied on uncharged conduct to revoke a defendant's probation, this Court reversed the order revoking the defendant's probation and

remanded for a new probation violation hearing.²² In *Pillar*, this Court determined that “[t]he hearing was devoid of *any verified facts* that would enable a rational trier of fact to conclude . . . that defendant violated the terms of his probation.”²³

Here, unlike in *Pillar*, the record is not devoid of facts to support three of the counts against Race. But the trial court did not explain the basis of its sentence, and this Court has concluded that insufficient evidence supported one of the counts against him. When this Court cannot determine to what extent the defendant’s sentence reflects his or her conviction on a vacated count, we should remand for resentencing.²⁴ Therefore, we conclude that the proper remedy in this case is to remand for resentencing. On resentencing, the trial court shall not consider those facts extraneous to the counts in the petition to revoke Race’s probation.

We vacate Race’s sentence and remand for resentencing. We do not retain jurisdiction.

/s/ William C. Whitbeck

/s/ Donald S. Owens

/s/ Michael J. Kelly

²² *Pillar*, 233 Mich App at 270.

²³ *Id.*

²⁴ *People v Ison*, 132 Mich App 61, 69; 346 NW2d 894 (1984); *People v Kumasi*, 489 Mich 863; 795 NW2d 149 (2011).